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No. 119, Original

In The

Supreme Court of the United States

October Term, 1991

State of Connecticut,
Commonwealth of Massachusetts, and
State of Rhode Island and
Providence Plantations,

Plaintiffs,

v.

State of New Hampshire,

Defendant.

VINCENT L. McKUSICK, SPECIAL MASTER

FIRST INTERIM REPORT WITH RECOMMENDATIONS ON MOTIONS TO INTERVENE

May 26, 1992

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I. BACKGROUND

On January 27, 1992, this Court granted the motion of the State of Connecticut, the Commonwealth of Massachusetts, and the State of Rhode Island and Providence Plantations for leave to file a complaint against the State of New Hampshire challenging the constitutionality of Chapter 354 of the 1991 Laws of New Hampshire, which created the New Hampshire Nuclear Station Property

Tax (the "Seabrook Tax"[1]) and made related changes in the New Hampshire Franchise and Business Profits Taxes. Chapter 354 classified nuclear station property as a special class of property for taxation purposes and imposed an *ad valorem* tax of 0.64 percent annually on the owners of nuclear station property located within New Hampshire. Chapter 354 also (1) repealed the New Hampshire Franchise Tax so far as it applied to electric utilities, and (2) granted utilities owning nuclear station property a credit against the New Hampshire Business Profits Tax to the extent of the Seabrook Tax paid by them.

The Seabrook Station, the one and only nuclear power station in New Hampshire, is owned in undivided percentage shares by electric utilities operating in New Hampshire and the three Plaintiff States. Public Service Company of New Hampshire owns the largest single share in the Seabrook Station, 35.6 percent. The six non-New Hampshire utilities seeking to intervene in this action own collectively about 38 percent of the Seabrook Station.

The Plaintiff States allege that "[v]irtually all" of the citizens of Connecticut and Rhode Island and the "vast majority" of the citizens of Massachusetts are consumers of electricity purchased directly or indirectly from utilities that are joint owners of the Seabrook Station. The Plaintiff States, observing that the cost of the Seabrook

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[1] The Seabrook Nuclear Station at Seabrook, New Hampshire, is the only facility subject to the property tax that is here challenged.

Tax has been or is likely to be passed on to consumers within those states, contend that the burden of the tax will fall disproportionately upon consumers in states other than New Hampshire.

Chapter 354 fixed the assessed valuation of the Seabrook Station at $3.5 billion for 1991, for a total annual tax of $22.4 million, with the first tax payment due on September 15, 1991. The Plaintiff States estimate the "total direct economic cost" of the Seabrook Tax on themselves, their instrumentalities and their citizens at about $14 million during the first year of the tax and more than $500 million over the life of the Seabrook Station.

Suing in a proprietary capacity as themselves consumers of electricity purchased from owners of the Seabrook Station, and also in a *parens patriae* capacity as representatives of the interests of their citizens, the Plaintiff States ask this Court to declare Chapter 354 unconstitutional and to enjoin the collection of the Seabrook Tax. The Plaintiff States urge that Chapter 354 offends the United States Constitution on four alternative grounds: (1) violation of the Supremacy Clause, art. VI, cl. 2, by imposition of a discriminatory tax in contravention of 15 U.S.C. § 391; (2) undue burden upon interstate commerce in violation of the Commerce Clause, art. I, § 8, cl. 3; (3) denial of equal protection of the laws guaranteed by the Fourteenth Amendment; and (4) violation of the Privileges and Immunities Clause, art. IV, § 2, cl. 1.

After the Court granted the Plaintiff States' motion for leave to file their complaint against the State of New Hampshire, two groups moved to intervene as plaintiffs. On March 27, 1992, the Connecticut Office of Consumer

Counsel filed its motion to intervene, to which New Hampshire filed a response on April 9. On April 16, six utility owners of shares of the Seabrook Station, The United Illuminating Company, New England Power Company, The Connecticut Light & Power Company, Canal Electric Company, Montaup Electric Company and Taunton Municipal Lighting Plant (the "Utilities"), filed their motion to intervene, to which New Hampshire responded on April 29. The Utilities filed a reply to New Hampshire's response on May 13.

By Order dated May 18, the Court referred the two pending motions to intervene to me as Special Master. After reviewing the pleadings and briefs and after hearing oral argument of counsel, I herewith respectfully submit my recommendations on the motions to intervene and my reasons therefor.

II. ANALYSIS

A. Motion of the Connecticut Office of Consumer Counsel to Intervene

The State of Connecticut is one of the original parties bringing this action before this Court, with its legal representation provided by its Office of Attorney General. Another agent of the State of Connecticut, its Office of Consumer Counsel, now seeks by intervention to join the State as a co-plaintiff. I can find no precedent for the requested intervention. On the constitutionality of Chapter 354 – the one and only question that will be decided in this original action – the interests of the State of Connecticut and its Office of Consumer Counsel are identical. The would-be intervenor argues that Connecticut law declares

it to be the only proper state agent for asserting the interests of electric customers and that it can do so more independently than can the Office of Attorney General; but those arguments represent merely one side of an intramural dispute within Connecticut state government, a dispute that this Court cannot undertake to resolve. I would deny the first motion to intervene.

Rule 17.2 of the Supreme Court Rules provides that the Federal Rules of Civil Procedure, "when their application is appropriate, may be taken as a guide to procedure in an original action in this Court." In navigating this unique procedural sea, however, this Court's own precedents provide the most reliable beacons. *See, e.g., Arizona v. California*, 460 U.S. 605, 614 (1983) (noting, in the context of a motion to intervene, that "our own Rules make clear that the Federal Rules are only a guide to procedures in an original action").

In *New Jersey v. New York*, 345 U.S. 369 (1953), this Court had occasion to consider a petition closely resembling that at bar. The Court rebuffed the bid of the City of Philadelphia to intervene in a water-rights dispute in which the Commonwealth of Pennsylvania already had been permitted to intervene as a party, declaring:

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.

Id. at 373 (citation omitted). Imposition of this stringent standard, the Court reasoned, would serve the important

policy goals of respecting "sovereign dignity" and promoting judicial efficiency. Sovereign dignity would be undermined by the Court's involvement in "intramural dispute[s]" among competing representatives; a state "might be judicially impeached on matters of policy by its own subjects . . . ." *Id.* Judicial efficiency likewise would be threatened by the allowance of multiple representatives; "there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id.* The City of Philadelphia failed to satisfy its burden of compelling differentiation. Indeed, the Court observed, the City's counsel were "unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests." *Id.* at 374.

The Connecticut Office of Consumer Counsel struggles to meet the *New Jersey* test, contending that it plays a unique statutory role as the sole authorized representative of Connecticut ratepayer interests in both the state and federal courts, and that the Office of Attorney General is compromised in its representation by conflicts of interest, specifically by the alleged responsibility of that office to defend the expected ruling of the Connecticut regulatory authority to pass the Seabrook Tax through to Connecticut consumers.

The would-be intervenor's attempt at differentiation, however, is even less persuasive than that of the City of Philadelphia. While the City of Philadelphia is a political subdivision of the state, the Connecticut Office of Consumer Counsel *is* the state. Moreover, on the only issue

before this Court, the positions of the Connecticut Attorney General and Consumer Counsel precisely coincide. Both urge this Court to declare Chapter 354 unconstitutional and to enjoin the collection of the Seabrook Tax. Indeed, the would-be intervenor proposes to adopt in full the State of Connecticut's complaint. Any possible divergence as to the passthrough of the Seabrook Tax is here irrelevant. This Court either will strike down the Seabrook Tax (in which event the matter of passthrough will be moot) or will uphold the Seabrook Tax (in which event the matter of passthrough will not be decided in this forum). The Office of Consumer Counsel, like the City of Philadelphia in the *New Jersey* case, fails to identify a single concrete respect in which the State of Connecticut, through its Office of Attorney General, inadequately represents consumer constituents on the constitutionality question to be decided by this Court. Neither sovereign dignity nor judicial efficiency would be served by allowing the requested duplicative representation of the identical interest.

Although I recommend that this Court deny the intervention motion of the Connecticut Office of Consumer Counsel, I have accorded it *amicus curiae* status in the proceedings before me. I believe that its *amicus* participation may be of some assistance in preparing this case for submission to the Court. I make no recommendation whether the would-be intervenor should have *amicus curiae* status before the Court after the filing of my final report.

B. Motion of the Utilities to Intervene

I come to the opposite conclusion on the Utilities' motion to intervene. I would grant their motion. As is evident on the face of their complaint, the Plaintiff States, in their *parens patriae* role, represent only electric consumers. They do not purport to represent the interests of the Utilities. Nor do the Utilities for their part seek, as did the Connecticut Office of Consumer Counsel, to don the mantle of electric consumers in a manner that would undermine the sovereign dignity of the Plaintiff States.

First, the Utilities are uniquely and directly affected as the taxpayers immediately liable for payment of the Seabrook Tax. To the extent the regulatory authorities do not allow the Utilities to pass the tax along to consumers through increased rates, the Utilities suffer an immediate injury that the Plaintiff States do not represent. Even if the regulatory authorities permit the Utilities to pass the entire tax through to consumers, they still suffer a distinct injury in that increased rates are likely to dampen demand and to raise regulatory resistance to other, independently justified rate increases. The Utilities plainly possess an interest separate and distinct from that of the electric customers who alone are represented by the three Plaintiff States in their *parens patriae* capacity. *See Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (the Court, noting the intervenors' "direct stake" in the action, adopted Special Master's recommendation that 17 pipeline companies directly paying Louisiana tax be permitted to intervene in *parens patriae* action prosecuted by other states on behalf of consumers paying pass-through tax).

Second, whereas considerations of judicial economy militate against allowing the Connecticut Office of Consumer Counsel to intervene, they weigh in favor of intervention by the Utilities. The Utilities possess information central to the framing of the constitutional questions. Although counsel for the parties are currently engaged in a good faith effort to stipulate to facts and documents, their agreement may well not cover the entire universe of relevant data. Should it become necessary to resort to discovery or eventually to trial of disputed facts, the presence of the Utilities as parties would facilitate access to information and expedite the submission of this case to the Court for final decision. *See, e.g.*, Fed. R. Civ. P. 33, 36 (interrogatories, requests for admission to be served upon *parties*). I am confident that as intervenors the Utilities will work cooperatively with the States to submit this case in an efficient and expeditious manner. *See Maryland v. Louisiana*, 451 U.S. at 745 n.21 (noting that participation by taxpayers as intervenors would facilitate "a full exposition of the issues").

III. CONCLUSION

For the foregoing reasons, I recommend that this Court enter the following form of Order:

This case having been submitted on the report of the Special Master dated May 26, 1992 [and the exceptions of the parties thereto],

IT IS ORDERED that the motion to intervene of the Connecticut Office of Consumer Counsel is DENIED; and

IT IS FURTHER ORDERED that the motion to intervene of The United Illuminating Company, New England Power Company, The Connecticut Light & Power Company, Canal Electric Company, Montaup Electric Company and Taunton Municipal Lighting Plant is GRANTED; and Defendant State of New Hampshire is directed to file and serve its answer to the complaint of those intervening Plaintiffs within 20 days of this Order.

Respectfully submitted,

VINCENT L. MCKUSICK
Special Master
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May 26, 1992